UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

AMERICAN TOOL CRAFT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 1:03-CV-399**
	)	
DANA CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

In this diversity action,[1] Plaintiff American Tool Craft, Inc. ("American") alleges that Defendant Dana Corporation ("Dana") breached a contract by failing to pay for goods that it ordered from American. Before the Court is Dana's Motion for Summary Judgment, which argues that (1) Dana is not obligated to pay for the disputed goods under the terms of the contract; and (2) American's claim is barred by the statute of limitations. Also pending are Dana's two motions to strike. After considering the motions and the relevant law, the Court finds that Dana's Motion for Summary Judgment should be GRANTED, its First Motion to Strike should be DENIED, and its Second Motion to Strike should be GRANTED.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

Since 1995, American has manufactured and sold precision tooling to Dana. (Compl. ¶

[1]*See* 28 U.S.C. § 1332. Plaintiff is a citizen of Indiana, Defendant is a citizen of Virginia and Ohio, and the amount in controversy is more than $75,000. (Notice of Removal ¶¶ 3-6.) Jurisdiction of the undersigned Magistrate Judge is based on 28 U.S.C. § 636(c), all parties consenting.

[2]For summary judgment purposes, the facts are recited in the light most favorable to American, the nonmoving party. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

1; Answer ¶ 1.) Dana requests tooling by mailing purchase orders to American specifying the items desired, quantity, and price. (*See* Compl., Ex. A.) The purchase orders often direct American to ship some items immediately, but to withhold shipment on the remaining items until Dana later "releases" them (*i.e.*, requests that they be shipped). (*E.g., id.*, Ex. A at 1 ("Ship 4 now and bal[ance] per Dana release.")

American claims that, in addition to these written orders, American and Dana came to an oral agreement on several other contract terms. They purportedly agreed that all tooling would be released (and therefore shipped) no more than one year from the date it was ordered, and Dana promised to pay for all tooling no more than ninety days after shipment. (First Aff. of Carl Fenstermaker ¶ 4.)[3] Dana also allegedly promised "that payments would be made on items which [it] no longer needed." (*Id.* ¶ 5.)

Despite these alleged agreements, much of the tooling which Dana ordered from American in the mid-1990s has not yet been released or paid for. (Answers to Dana's First Req. for Admis., No. 1.) Accordingly, American filed the instant suit on September 19, 2003, alleging breach of contract due to Dana's failure to release and pay for this tooling. (*See* Compl.) Attached to American's Complaint is a stack of Dana purchase orders documenting the unreleased tooling; the most recent of these orders is dated July 17, 1997. (*See id.*, Ex. A.)

[3]Lamentably, American created confusion in the record by submitting two different documents both styled as "Affidavit of Carl Fenstermaker." Dana compounded this confusion by filing two motions to strike, each attacking a different Fenstermaker affidavit but taking little care to specify which affidavit is which. For the sake of clarity, this opinion refers to Fenstermaker's June 14, 2004, affidavit as his "First" affidavit, and his July 7, 2004, affidavit as his "Second" affidavit. Dana's motions to strike are similarly identified as "First" and "Second."

III. DISCUSSION

A. Dana's Motions to Strike

Dana's First Motion to Strike (Docket # 19) attacks the fifth paragraph of the First Fenstermaker Affidavit. As explained *infra*, Dana is entitled to summary judgment even if this paragraph is not stricken. Therefore, the First Motion to Strike is moot and will be denied.

Dana's Second Motion to Strike (Docket # 27) seeks to strike the Second Fenstermaker Affidavit in its entirety because it is not based on Fenstermaker's personal knowledge. American failed to timely respond to this motion, but that hardly matters, as the motion clearly has merit. Affidavits can only be used to defeat a summary judgment motion if they are based on personal knowledge. *See* Fed. R. Civ. P. 56(c), (e). Affidavits "based on information and belief" or "to the best of affiant's knowledge and belief" are insufficient. *Toro Co. v. Krouse, Kern & Co.*, 644 F. Supp. 986, 989 (N.D. Ind. 1986), *aff'd*, 827 F.2d 155, 162-63 (7th Cir. 1987); *see also, e.g., Bolen v. Dengel*, 340 F.3d 300, 313 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 1714 (2004); *Pace v. Capobianco*, 283 F.3d 1275, 1278-79 (11th Cir. 2002); *Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 414 (1st Cir. 2000). The Second Fenstermaker Affidavit runs afoul of these well-settled principles, as Fenstermaker does not state anywhere in the affidavit that he has personal knowledge of the facts therein, nor does he provide any facts from which an inference of personal knowledge could be drawn.[4] (*See* Second Fenstermaker Aff.) Rather, he only states that "the above and foregoing statements are true *to the best of my knowledge and belief*" (*id.* at 2 (emphasis added)), which is insufficient to defeat a summary judgment motion, *Toro*, 644 F.

[4]Although Fenstermaker states that he is "Chairman of the Board of [American]" (Second Fenstermaker Aff. ¶ 1), he does not explain how this position provided him with personal knowledge of the other matters in his affidavit.

Supp. at 989. Therefore, Dana's Second Motion to Strike will be granted.[5]

B. Dana's Motion for Summary Judgment

Summary judgment may be granted only if there are no disputed genuine issues of material fact. *Payne*, 337 F.3d at 770. When ruling on a motion for summary judgment, a court "may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Id.* The only task in ruling on a motion for summary judgment is "to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). If the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmoving party, summary judgment may not be granted. *Payne*, 337 F.3d at 770. A court must construe the record in the light most favorable to the nonmoving party and avoid "the temptation to decide which party's version of the facts is more likely true[,]" as "summary judgment cannot be used to resolve swearing contests between litigants." *Id.* However, "a party opposing summary judgment may not rest on the pleadings, but must affirmatively demonstrate that there is a genuine issue of material fact for trial." *Id.* at 771.

Dana argues that it is entitled to summary judgment on two separate grounds. First, Dana contends that it is not obligated to pay for tooling until it is released, no matter how long the delay between the purchase order and the release; therefore, it cannot be liable to pay for the unreleased tooling upon which this suit is based. Second, it argues that if American's testimony about the oral contract modifications is believed, as it must be at the summary-judgment stage,

[5]Dana's Second Motion to Strike also argues in the alternative that specific paragraphs of the Second Fenstermaker Affidavit and attached documents are defective, but because the affidavit is stricken in its entirety, the Court need not consider these arguments.

then American's claim is barred by the statute of limitations. As explained *infra*, the Court finds the second argument persuasive, obviating the need to consider the first.

Indiana's statute of limitations for "breach of any contract for sale" is four years.[6] Ind. Code. § 26-1-2-725(1). A cause of action for breach of contract accrues "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ind. Code § 26-1-2-725(2). According to American, it had an oral agreement with Dana that Dana would release all tooling within one year of ordering it and pay within ninety days of shipment. All the unreleased tooling for which American seeks payment was ordered on or before July 17, 1997 (*see* Compl., Ex. A), so it should all have been released no later than July 17, 1998, with payment due no later than October 15, 1998. American's claim accrued when Dana failed to pay on that day, and the statute ran four years later, on October 15, 2002. Unfortunately for American, it did not file suit until September 19, 2003, and the statute of limitations therefore bars its claim.

American tries to avoid this result by weakly arguing that there is a genuine issue of fact whether the statute was tolled. According to American, Dana continues to order, release, and pay for tooling pursuant to their agreement, including as recently as September 2003. (American's Reply Mem. (Docket # 26) at 3-4.) American argues that these actions constituted a partial payment of Dana's alleged debt and created an implied promise to repay the balance of the debt, thereby tolling the statute of limitations.

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[6]Neither party directly addresses the question of which state's law should apply to this case, and the contract is silent on the issue. However, the parties apparently agree that Indiana law should apply, as they both cite numerous Indiana authorities. Moreover, Indiana is the forum with the most intimate contacts to the facts. *See Bedle v. Kowars*, 796 N.E.2d 300, 302 (Ind. Ct. App. 2003) ("Indiana's choice of law rule for contract actions calls for applying the law of the forum with the most intimate contacts to the facts"). The Court therefore applies Indiana law.

Although American cites only antiquated cases to support its argument, *Meehan v. Meehan's Estate*, 186 N.E. 908 (Ind. Ct. App. 1933); *Weidenhammer v. McAdams*, 98 N.E. 883 (Ind. Ct. App. 1912), the basic principle of law still holds. An admission of continued indebtedness may be inferred from voluntary and unconditional part payments, if the payments are "accompanied by circumstances or evidence amounting to an unqualified acknowledgment of more being due." *Martin v. Brown*, 716 N.E.2d 1030, 1034 (Ind. Ct. App. 1999). This admission of indebtedness tolls the statute of limitations. *Id.* However, this doctrine does not help American, for two reasons. First, the only evidence American proffers that Dana made the alleged "partial payments" is contained in the Second Fenstermaker Affidavit, which was stricken in its entirety *supra*. With that evidence stricken, American fails to "set forth specific facts showing that there is a genuine issue for trial" and thus cannot avoid summary judgment. Fed. R. Civ. P. 56(e).

Second, even assuming *arguendo* that American has competent evidence to support its argument, the partial-payment doctrine still does not apply. American fails to point to any accompanying "circumstances or evidence" showing that Dana's payments on *released* tooling are an acknowledgment that it owes American for *unreleased* tooling. Dana has consistently taken the position that it does not owe American for any tooling until that tooling is released, no matter how long the delay between order and release. Accordingly, no reasonable jury could conclude that Dana's payments on released tooling were an admission of indebtedness on the unreleased tooling upon which this suit is based, such that the statute of limitations would be tolled. *Martin*, 716 N.E.2d at 1034.

In sum, crediting American's version of the contract terms (as the Court must), the statute

of limitations ran nearly a year before American filed suit. Further, American fails to create a genuine issue of material fact whether the statute was tolled by a partial payment of the alleged debt. Therefore, Dana is entitled to summary judgment.

IV. CONCLUSION

For the above reasons, Dana's First Motion to Strike is DENIED, its Second Motion to Strike is GRANTED, and its Motion for Summary Judgment is GRANTED. The Clerk is directed to enter judgment in favor of Dana and against American.

Enter for this 27th day of August, 2004.

/S/ Roger B. Cosbey
Roger B. Cosbey,
United States Magistrate Judge